



FH
[REDACTED]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]

REHEARING DECISION

FOF- 172925

PRELIMINARY RECITALS

On March 18, 2016, the above petitioner filed a hearing request under Wis. Admin. Code §HA 3.03, and 7 C.F.R. § 273.16, to review a decision by the Milwaukee County Department of Human Services to disqualify [REDACTED] from receiving FoodShare benefits (FS) for a period of one year. The petitioner did not appear at the first hearing, but her request for a rehearing was granted. That hearing was held on June 23, 2016, in Milwaukee Wisconsin. .

The issue for determination is whether the petitioner intentionally violated the FoodShare program's rules.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Respondent's Representative:

Attorney [REDACTED]
Legal Action of Wisconsin

[REDACTED]
[REDACTED]

Respondent:

Department of Health Services

[REDACTED]

Milwaukee Enrollment Services
1220 W Vliet St
Milwaukee, WI 53205

ADMINISTRATIVE LAW JUDGE:

Michael O'Brien
Division of Hearings and Appeals

FINDINGS OF FACT

1. The respondent (CARES # [REDACTED]) is a resident of Milwaukee County who received FoodShare in April 2011.
2. The respondent was issued a QUEST card that allowed her access to her monthly FoodShare allotment. QUEST cards are electronic benefit transfer cards that replaced food stamp coupon booklets.
3. The respondent lived in a treatment center in April 2011. Those running the center required her to turn her Quest card and PIN over to the director. Other residents would then use the card to shop for groceries for everyone at the center. The respondent did not know which resident had her card at any given time. Her card was debited \$125 each month to buy food for those in the center.
4. The respondent's QUEST card was debited \$100 at [REDACTED] [REDACTED] (JHD) on April 14, 2011. It is not clear who was using the card when it was debited
5. JHD was a licensed vendor of the United States Department of Agriculture Food and Nutrition Service, which enabled it to redeem QUEST cards.
6. JHD was classified as a mobile vendor and operated out of private vehicles. Between August, 2010 and January 2013, JHD redeemed approximately \$778,000 in QUEST benefits from food stamp benefit recipients who were not purchasing food, but instead receiving cash for providing access to their QUEST benefits.
7. On or about February 15, 2013, [REDACTED] [REDACTED], doing business as JHD, pled guilty to a charge of unlawfully purchasing and redeeming FS benefits. [REDACTED] [REDACTED] admitted that no food or groceries were ever provided by [REDACTED] and/or JHD in exchange for Quest benefits.
8. On March 24, 2016, the petitioner prepared an Administrative Disqualification Hearing Notice alleging that respondent intentionally transferred \$100 in FS benefits to JHD in exchange for cash payments.

DISCUSSION

Trafficking FoodShare benefits violates the program's rules. Wis. Stat. § 946.92(2g). It includes selling FoodShare benefits for cash. 7 CFR § 271.2; *see also* Wis. Stat. § 946.92(1)(dm)1. FoodShare recipients lose their eligibility if the department proves by clear and convincing evidence that they intentionally violated the program's rules; the penalty for the first violation is one year. 7 CFR §§ 273.16(e)(6) and (b)(1)(i). The Department seeks to disqualify the respondent for one year because it contends that she exchanged her FoodShare benefits for cash.

Clear and convincing is a middle level of proof that requires the Department to show that more than just a preponderance of the evidence supports its position but does not require it to eliminate all reasonable doubt, as it would have to in a criminal case:

Defined in terms of quantity of proof, reasonable certitude or reasonable certainty in ordinary civil cases may be attained by or be based on a mere or fair preponderance of the evidence. Such certainty need not necessarily exclude the probability that the contrary conclusion may be true. In fraud cases it has been stated the preponderance of the evidence should be clear and satisfactory to indicate or sustain a greater degree of certitude. Such degree of certitude has also been defined as being produced by clear, satisfactory, and convincing evidence. Such evidence, however, need not eliminate a reasonable doubt that the alternative or opposite conclusion may be true. ...

Kuehn v. Kuehn, 11 Wis.2d 15, 26 (1959)*Kuehn*, 11 Wis.2d at 26.

Wisconsin Jury Instruction – Civil 205 explains that this level of evidence must clearly have more convincing power than the opposing evidence, but it does not require absolute certainty:

Clear, satisfactory and convincing evidence is evidence which when weighed against that opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you that “yes” should be the answer because of its greater weight and clear convincing power. “Reasonable certainty” means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof. This burden of proof is known as the “middle burden.” The evidence required to meet this burden of proof must be more convincing than merely the greater weight of the credible evidence but may be less than beyond a reasonable doubt.

The *McCormick* treatise suggests that the standard “could be more simply and intelligibly translated to the jury if they were instructed that they must be persuaded that the truth of the contention is highly probable.” 2 *McCormick on Evidence* § 340 (John W. Strong gen. ed., 4th ed. 1992). Thus, to find that the respondent intentionally violated the FoodShare program’s rules, the evidence must induce a firm conviction that she attempted to purchase FoodShare benefits and that she did so intentionally, although there may be a reasonable doubt that this is true. Intent is a subjective state of mind determined upon all of the facts. *Lecus v. American Mut. Ins. Co. of Boston*, 81 Wis.2d 183 (1977). A person is presumed to know and intend the probable and natural consequences of her actions.

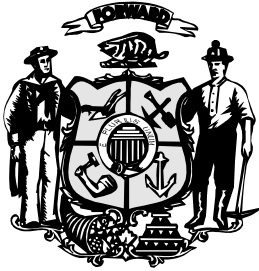
The allegation against the respondent occurred as part of the [REDACTED] investigation. [REDACTED] Distribution was a licensed FoodShare vendor operated by John [REDACTED]. But he did not sell any food. Instead he purchased FoodShare benefits from others for less than their stated value and then redeemed those benefits. Between August, 2010 and January 2013, [REDACTED] redeemed approximately \$778,000 in benefits in this manner from food stamp benefit recipients. On February 15, 2013, Mr. [REDACTED] pled guilty to unlawfully purchasing and redeeming FoodShare benefits. He admitted that he never provided food in exchange for the benefits.

The respondent’s card was redeemed for \$100 in FoodShare benefits at the [REDACTED] Distribution Center on April 14, 2011. Due to the nature of this illicit business, the most reasonable explanation is that whoever used the card there received cash for these transactions. But the respondent contends that she was not the one who used the card there. She testified that she lived in a treatment center that required her to turn her card and PIN over to it. In exchange for \$125 being debited each month, she was given one meal a day. The center sent residents to the store with Quest cards and PINs to purchase the food. The respondent never knew what resident had her card at any particular time, and she had no control over it while she lived there.

If the respondent’s testimony is truthful—which it appeared to be—the treatment center likely violated FoodShare law. Of course, the issue is not whether the center violated the law. Instead the issue is whether, in light of the center’s decision to hand her card and PIN to addicts in various stages of rehabilitation, the department has proved that it is highly plausible that during this period she used her card to obtain cash from the [REDACTED] Distribution Center. In light of these facts, it is not highly plausible, or even likely, that she did this. Rather, what likely happened was something that was almost inevitable under these circumstances: someone whose life had been going in the wrong direction took advantage of situation to pocket some extra money. Because the department has not proved by clear and convincing evidence that the respondent intentionally violated FoodShare program rules it cannot disqualify her from the program for one year.

For the reasons discussed above, there is no clear and convincing evidence that the respondent intended to commit an IPV.

That the petitioner's determination of an intentional program violation is reversed, and the petition for review is hereby dismissed.



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on July 8, 2016.

Milwaukee Enrollment Services
Public Assistance Collection Unit
Division of Health Care Access and Accountability
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